

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

AR BUTUS BIOPHARMA CORP., . Case No. 1:22-cv-00252-MSG
et al, .
Plaintiffs, . James A. Byrne U.S. Courthouse
v. . 601 Market Street
MODERNA, INC., et al, . Philadelphia, PA 19106
Defendants. .
June 13, 2024
11:10 a.m.
.

TRANSCRIPT OF DISCOVERY CONFERENCE HEARING

BEFORE HONORABLE MITCHELL S. GOLDBERG
UNITED STATES DISTRICT COURT CHIEF JUDGE

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1 THE COURT: We good? Okay. Good morning. This is
2 the matter Arbutus versus Moderna. It's a Delaware matter
3 where I'm sitting on designation. We're here to discuss, I
4 think it's a total of four, maybe five, discovery disputes.
5 I'll get the lawyers input. I probably won't give you rulings
6 right here from the bench. So who is here on behalf of the
7 plaintiff?

8 MS. DiBENEDETTO: Good morning, Your Honor. For
9 plaintiffs I'm Emily DiBenedetto from Shaw Keller. With me
10 today are Adam Harber, Shaun Mahaffy and Phil Haunschild from
11 Williams and Connolly. We also have Pete Zorn, president chief
12 legal officer of Genevant and Linsday Androski special counsel
13 for Genevant. I'm also joined by Adam Brausa from Morrison
14 Foerster for Arbutus and Liz Howard who is dialing in today.
15 In house counsel for Arbutus.

16 THE COURT: Okay. Good morning everybody. For
17 Moderna?

18 MR. EGAN: Good morning, Your Honor. Brian Egan from
19 Morris Nichols on behalf of the Moderna defendants. Joining me
20 today at counsel table is Pat Carson and Mark McLennan from
21 Kirkland and Ellis. We also have Mara Greenberg from Kirkland
22 and Ellis. And we have a Kirkland summer associate joining us
23 today Heidi.

24 THE COURT: Good morning again. Just remind me when
25 you start talking -- just remind me of your name before you do

1 that. So what I've done is -- what we've done is try to
2 categorize -- I know there's a lot of sub parts. So what I'll
3 try to do is frame what I think the -- what I understand the
4 issue to be and then I think the first three are plaintiffs'
5 requests for additional discovery and the last one is Moderna.
6 But we'll start with plaintiffs request.

7 I'll frame what I think the issue is. You can
8 certainly supplement or tell be if I incorrectly frame the
9 issue and then I'll hear first from the plaintiff and then I'll
10 hear the response and then we'll move on and we'll have
11 conversation.

12 So the first dispute as I understand it pertains to
13 more information sought from the CEO of Moderna. You're going
14 to have to bear with me while I pause and look at some of my
15 notes. So I did review the schedule that's in place and note
16 that, that discovery recently closed. I think that's May 30.
17 So was -- how do pronounce the CEO's name? Is it --

18 MS. CARSON: It's Bancel.

19 THE COURT: Okay. Has he -- has he been deposed?

20 MS. CARSON: He has not been deposed in this case,
21 no.

22 THE COURT: Okay. So let's -- why don't you tell me
23 what information you think is deficient and what more do you
24 need from CEO Bancel?

25 MR. HARBER: Thank you, Your Honor. Adam Harber of

1 Williams Connolly for plaintiff. The issue here is -- and
2 we've highlight three specific areas where we feel like despite
3 the information that Moderna has produced, we're missing very
4 specific relevant information. This is a case as you know that
5 involves the single most important first commercial product.

6 THE COURT: What are the three specific areas of
7 information you think are deficient?

8 MR. HARBER: The first is on direct licensing
9 communications that Mr. Bancel had with Arbutus and Genevant
10 and their predecessor at Tekmira. Starting in 2013, there were
11 direct conversations that Mr. Bancel has one on one with both
12 the inventor of the patents in suit that are asserted in this
13 case and the CEO at the time of Arbutus' predecessor about
14 licensing the technology. We do not have --

15 THE COURT: That's you.

16 MR. HARBER: Right.

17 THE COURT: Why do you need discovery from him
18 pertaining to information that he -- or conversations he has
19 with you?

20 MR. HARBER: Because it would bear on his -- we have
21 some direct e-mails back and forth which we've cited in our
22 brief. What we don't have is what was he telling people
23 internally. Does he have -- was he reporting conversations
24 that were had during those really critical meetings in the
25 case. Are there business discussions. Obviously there are

1 some legal communications he would have that are potentially
2 privileged. But not if he's directly reporting on a
3 conversation. Not if he's talking about a business
4 discussions. And I think very critically they're -- he's
5 having scientific discussions with our CEO and our inventor.

6 One of Moderna's key themes that Your Honor has heard
7 that -- I think every time we've been in front of Your Honor is
8 -- we're mRNA company -- your patents in their view don't
9 discuss or don't enable your LNP technology with mRNA. Now we
10 think that's absurd and it's belie by the fact that they tried
11 to negotiate a license with us for ten years. But was he --
12 what was the scientific discussion that Mr. Bancel was having
13 internally with Moderna. Those are critical discussions and
14 we've offered to be very targeted to negotiated specific search
15 turns.

16 THE COURT: Critical discussions regarding
17 infringement in validity or damages?

18 MR. HARBER: Validity.

19 THE COURT: Okay.

20 MR. HARBER: The specific -- obviously the -- I would
21 say it goes to both damages and validity.

22 THE COURT: So you obviously have to concede you have
23 the information regarding discussions he had with your folks.
24 You want to know did he go back and -- and I'm sort of dumbing
25 this down -- but create an internal memo memorializing

1 discussions that he had with you folks or other non privileged
2 discussions he had with other people about in response to the
3 discussions he had with your folks.

4 MR. HARBER: Exactly, Your Honor.

5 THE COURT: Okay and tell me what -- I'm going to let
6 them speak obviously -- they said no to that because why?

7 MR. HARBER: They said you other -- you know we've
8 given you the 30(b) (6) on licensing. You've had -- you have
9 other witnesses or custodians who are involved in licensing as
10 well. And we don't dispute any of that, but none of that has
11 address this specific information from Mr. Bancel. So for
12 example the 30(b) (6) witness didn't talk to Mr. Bancel to
13 prepare for his deposition. So the notion that, that was a
14 replacement for information directly from his files is not
15 accurate.

16 THE COURT: I mean you're probably going to say yes
17 to this with a smile but, does all this get resolved if I would
18 order a very time constraint deposition of Mr. -- is it Pancel
19 or Bancel?

20 MR. HARBER: Bancel.

21 THE COURT: Bancel with a B.

22 MR. HARBER: I --

23 THE COURT: Bancel with -- with some very specific
24 topics that you want to cover that you think have -- are
25 deficient.

1 MR. HARBER: We would welcome that opportunity. I
2 think that's important. I would say though, I do think even --
3 we're willing to do it narrowly. We -- when Moderna raised the
4 issue of cost shifting, we reached out to them and said what's
5 your hit count? What do you -- what did it cost? And they
6 refused to engage with us.

7 But the -- I do think it's important not just to let
8 kind of a talented CEO testify about this stuff without us
9 being able to see anything in his documents. Now again, we're
10 willing to -- we've been willing to negotiate very narrow
11 search terms, very targeted --

12 THE COURT: Who's responding from Moderna on this?

13 MS. CARSON: I am, Your Honor.

14 THE COURT: Could you remind me your last name? I'm
15 sorry.

16 MS. CARSON: Pat Carson.

17 THE COURT: There's so many lawyers. I apologize.

18 MS. CARSON: It's okay. Pat Carson.

19 THE COURT: Carson. Okay.

20 MS. CARSON: Like in Johnny.

21 THE COURT: And you did say your name. Say it again,
22 I'm sorry.

23 MR. HARBER: Adam Harber.

24 THE COURT: Harber.

25 MR. HARBER: Yes.

1 THE COURT: Is a clean way to resolve this -- and
2 you'll push back if you don't think so -- it's just to pick a
3 reasonable amount of time. You produce your CEO. They send to
4 me discreet areas that they want to cover and we just get it
5 done that way. Why is that a bad idea, Ms. Carson? Or may you
6 agree it's a good idea. I don't know.

7 MS. CARSON: I would never say that you have a bad
8 idea, Your Honor.

9 THE COURT: Okay, I wouldn't mind.

10 MS. CARSON: But I have to push back on --

11 THE COURT: Yeah.

12 MS. CARSON: -- even a short deposition of the CEO.

13 THE COURT: Why?

14 MS. CARSON: Because they have the information and
15 when they filed this motion --

16 THE COURT: Right, so let's draw down -- and I'm glad
17 you didn't say because he's so very important, because that
18 wasn't going to swing.

19 MS. CARSON: Okay.

20 THE COURT: So they say that communications that he
21 had with persons internal to their shop. They're -- obviously
22 they're not going to bother you or me with that.

23 MS. CARSON: Right.

24 THE COURT: But any type of memorialization of those
25 communications they don't have. Accurate or not?

1 MS. CARSON: They don't think that's accurate.

2 THE COURT: Why?

3 MS. CARSON: Because they're talking about a
4 conversation that happened at a cocktail party over ten years
5 ago during a conference with Ian McGlocklin (phonetic) and so
6 that's the conversation that they're --

7 THE COURT: I didn't hear Mr. Harber say he wanted a
8 memorialization on the cocktail conversations. So I'll ask you
9 -- you know, we can cut through some of this now. Did your CEO
10 -- during what time period are we talking about?

11 MR. HARBER: This is from 2013, 2014 -- or in
12 particular but it's continued.

13 THE COURT: 2013 through?

14 MR. HARBER: I mean really through 2018.

15 THE COURT: All right so, 2013 through 2018, did your
16 CEO memorialize any conversations, business conversations, that
17 are not privileged that he had with persons -- high level
18 persons at Arbutus?

19 MS. CARSON: I can -- I can't tell you what's in the
20 CEO's files.

21 THE COURT: Okay.

22 MS. CARSON: But what I can tell you --

23 THE COURT: Well why shouldn't I order you to look?

24 MS. CARSON: Because that would be incredibly
25 burdensome --

1 THE COURT: Why?

2 MS. CARSON: -- on top of --

3 THE COURT: For one person's files. I --

4 MS. CARSON: It's one person's files. It would have
5 to be reviewed with search terms that they proposed that were
6 never part of our search terms to begin with.

7 THE COURT: Okay. What are your search terms?

8 MR. HARBER: They're in Attachment A to our --

9 THE COURT: Just tell me. What are they? Hand them
10 up.

11 MR. HARBER: To the specific issue of whether they're
12 additional search terms of what's proposed -- there, Your
13 Honor, this is my copy so I don't have it to look at, but --

14 THE COURT: I'll give it back. Is it what's
15 highlighted?

16 MR. HARBER: Yes.

17 THE COURT: Okay.

18 MR. HARBER: We've proposed some additional terms to
19 try to narrow, not to broaden. We've narrowed it from the
20 terms that were used with everyone else.

21 THE COURT: Okay. I'm not going to be able to digest
22 all of this right now. So why are there search terms --

23 MS. CARSON: Their search terms are broader and
24 different than what we negotiated for the entire case after
25 close to four months of negotiations.

1 THE COURT: Mm-mm.

2 MS. CARSON: So they want us to run those against our
3 CEO's files and produce documents so they have to be reviewed
4 for privilege, for relevancy and then produced and we have
5 already produced close to 50,000 e-mails.

6 THE COURT: But not -- but not --

7 MS. CARSON: But, Your --

8 THE COURT: -- but not the documents that Mr. Harber
9 is talking about directly connected to your CEO.

10 MS. CARSON: But, Your Honor --

11 THE COURT: Right?

12 MS. CARSON: -- that's -- those are documents --

13 THE COURT: Before -- wait. Before you say the but
14 --

15 MS. CARSON: Okay.

16 THE COURT: -- is what I said correct?

17 MS. CARSON: They don't know those documents exist.

18 THE COURT: Well.

19 MS. CARSON: Okay.

20 THE COURT: Okay. That's not how discovery works.

21 They -- it's reasonable for them in my view to request internal
22 documents from such a high level. The highest level person of
23 your client pertaining to discussions that they had with the
24 plaintiff in the case. I mean you wouldn't dispute that,
25 right?

1 MS. CARSON: I'm not disputing that, but what you see
2 in Mr. Bancel's files, is when he gets into something
3 substantive, in -- for this topic area and the other the other
4 two topics, okay. He immediately involves his team.

5 THE COURT: Mm-mm.

6 MS. CARSON: And that's how we chose our custodians.
7 We chose the custodian that was responsible for the licensing
8 and all the negotiations and I have testimony from the
9 president of Moderna that basically says that Said Francis, who
10 is the vice president of licensing at Moderna, is the person
11 that was responsible for talking to their client during 2013,
12 2014, 2015, 2016.

13 They had Mr. Said's -- Mr. Francis' deposition. He
14 was the 30(b) (6) witness. They have all of his documents and
15 Mr. Bancel did not cut out his licensing person on substantive
16 discussions. He forwards them all to Mr. Francis. That's true
17 for every topic.

18 THE COURT: So is your -- are you saying you're
19 prepared to represent here and now that you have done a
20 diligent search, as you're obligated to do, and you're aware of
21 what your CEO has produced in a writing or other form and if
22 you would -- if I ordered him to produce all that it would be
23 repetitive because it's already been produced through other
24 people?

25 MS. CARSON: Your Honor, I can't stand here and say

1 that there's not going to be a e-mail or a note to file I had a
2 conversation with somebody.

3 THE COURT: This is the CEO -- I -- this is the CEO
4 of the company. This is -- it seems to me unless I'm missing
5 it, pursuit of information from him is the most important
6 pursuit that Arbutus would want to follow.

7 MR. CARSON: All indications are it would be
8 completely duplicative of what they've already done.

9 THE COURT: But yet you're not prepared to assure me
10 and Arbutus' counsel that it would -- that it is duplicative.

11 MS. CARSON: I can not make that representation --

12 THE COURT: Okay.

13 MS. CARSON: -- that there's not a single piece of
14 paper out there that they don't have. But what I can tell you
15 is that plaintiffs have done a masterful job of making this the
16 most burdensome, most expensive discovery that they possibly
17 can --

18 THE COURT: Well, that --

19 MS. CARSON: -- to impose maximum --

20 THE COURT: Hold on, hold on, hold on. So those
21 arguments probably are not going to sway me because -- because
22 I would predict that they were going to say the same thing
23 about you. So, am I right?

24 MR. HARBER: You're right, Your Honor.

25 THE COURT: Okay, so I'm assuming there's been

1 incredibly robust discovery request. Probably way more than
2 what's ever going to be needed at a trial by both sides, so --
3 okay. I think you ought to tell your CEO that he's probably
4 going to be deposed and we're going to look at your search
5 terms and your objections to his search terms -- to his search
6 terms. And we're going to try to pick a very discreet
7 reasonable area of search terms and you're going to go ahead
8 and maybe get his deposition. And I really don't want to hear,
9 well we need this universe of documents first.

10 What you're going to do is, you're going to conduct
11 the deposition on these discrete search terms with the
12 documents available and then if you still think that there's
13 information that you don't have after a deposition. If you
14 want, in good faith you can come back. So we're going to look
15 at the search terms, okay. So moving on --

16 MS. CARSON: Thank you, Your Honor.

17 THE COURT: -- we'll pick what we think is
18 reasonable. And when I say search terms, I mean areas and
19 inquiry -- I'm using the wrong term. We're going to set out
20 parameters on areas of inquiry. Discreet areas of inquiry.
21 And we'll also pick a time limit. So let me just look at my
22 notes for second.

23 All right, I mean, I'll hear more from both attorneys
24 but I think the resolution is going to be an order, as I said,
25 ordering the deposition of the CEO. I'm going to layout areas

1 you can cover and I know all of the areas you think are
2 deficient as it relates to information from the CEO and I will
3 cover that in my order as to what you can ask him about what
4 you can't ask him about.

5 MR. HARBER: Thank you, Your Honor.

6 THE COURT: And regretting the day I'm saying this.
7 If you let me know the day of the deposition, I'll try to keep
8 my calendar clear so if you ask questions that you think are
9 within the bounds of my order and there's direction not to
10 answer I can cut that knot and likewise if you think he's going
11 beyond my order I'll try to remain available to mediate that so
12 to speak.

13 MS. CARSON: So, Your Honor, that goes right into my
14 question --

15 THE COURT: Yeah.

16 MS. CARSON: -- which is, this is going to be a time
17 limited deposition, correct?

18 THE COURT: Yes.

19 MS. CARSON: I will say, the plaintiffs have used up
20 the 85 hours that we agreed each side gets so they're out of
21 time.

22 THE COURT: Okay. If you think -- if you think --
23 okay. Fair enough. I'm going to give them more time, but I'd
24 extend the same courtesy to you.

25 MS. CARSON: I'm just asking you that you keep it

1 very -- as short as humanly possible.

2 THE COURT: Five minutes, is that good enough?

3 (Laughter)

4 THE COURT: It took six minutes to introduce all the
5 lawyers. All right. Agreed.

6 MS. CARSON: Okay.

7 THE COURT: Agreed. Yeah. It's -- yeah. Yes.

8 MS. CARSON: And just to make sure I understand --

9 THE COURT: Mm-mm.

10 MS. CARSON: Is the depositions going to happen.
11 They're going to ask about these topics at the deposition and
12 then if there's stuff that they think comes out that there are
13 documents, then we do the search. Is that the proper order?

14 THE COURT: Yeah. You know, I'm a little muddled on
15 my thinking of that right now. But my sense is -- and I'll
16 take Mr. Harber's push back on this if he wants. You have
17 topics that you think are -- have information that are
18 deficient. To me, the best way to cover that is for you to be
19 able to question the CEO about those topics. I also think that
20 you have enormous amounts of information that -- documents that
21 you can use to prepare for this deposition.

22 So, I'd like it to be, deposition order, this amount
23 of time on this topic, so that's my order. Without having to
24 then say, but before the deposition you get these additional
25 documents.

1 MR. HARBER: That's fair, Your Honor.

2 THE COURT: Okay. And then if you want after having
3 reviewed the 50 truck loads of information you already have
4 plus his deposition, if you then think well there's really
5 something more I want to bother the judge about you can come
6 back.

7 MR. HARBER: All right. Appreciate that.

8 THE COURT: Okay. All right. Okay?

9 MS. CARSON: Thank you, Your Honor.

10 THE COURT: Okay. All right, so we'll draw down,
11 look at the topics. Look at Moderna's objections and try to
12 tailor something that's matched, okay?

13 MR. HARBER: Appreciate it. Thank you, Your Honor.

14 THE COURT: Okay. So I think that, that meant --
15 that deals with Gen -- doesn't -- does that resolve the --
16 everything that relates to the CEO? Yeah, okay. Well, we --
17 you and I do something.

18 MS. CARSON: Yeah.

19 THE COURT: Okay. So the next topic -- let me just
20 review my notes so I understand it. I think that the issue is
21 that Arbutus is pressing that they want witnesses to explain
22 publications authored by Moderna scientists and there's seven
23 publications and Moderna's position is six of those
24 publications have nothing to do with the issues in this case
25 and this is burdensome. And if I have that right, Mr. --

1 MR. HARBER: Harber.

2 THE COURT: Harber with a B not P.

3 MR. HARBER: Yes, B, yeah.

4 THE COURT: Harber. How do I resolve this without
5 having to try to read myself the seven publications which I
6 probably wouldn't understand, you know, a lot.

7 MR. HARBER: We have a proposal. My colleague, Shaun
8 Mahaffy, he's going to address --

9 THE COURT: Yeah. Sure.

10 MR. HARBER: The second topic is part of this. I'll
11 address and I'll let him address that question.

12 THE COURT: Mm-mm.

13 MR. MAHAFFY: Thank you, Your Honor. Shaun Mahaffy
14 from Williams Connolly.

15 THE COURT: Mahaffy?

16 MR. MAHAFFY: Mahaffy. M-a-h-a-f-f-y.

17 THE COURT: M-a-h --

18 MR. MAHAFFY: -- a --

19 THE COURT: -- f-f-y.

20 MR. MAHAFFY: -- f-f-y.

21 THE COURT: Go ahead.

22 MR. MAHAFFY: So, Your Honor, we're going to try to
23 simplify things. Hopefully this won't be too complicated.

24 THE COURT: Mm-mm.

25 MR. MAHAFFY: We've take the deposition of a number

1 of their witnesses and we're willing to withdraw this topic. A
2 few things though. So the compromise that we've proposed is
3 that we've like for the testimony of their president to be
4 designated on this topic. He testified about some of these
5 articles and we'd like that to be designated as --

6 THE COURT: Not the CEO. Not the --

7 MR. MAHAFFY: Not the CEO. The president who has
8 already testified.

9 THE COURT: He's already testified.

10 MR. MAHAFFY: He's already testified.

11 THE COURT: Okay.

12 MR. MAHAFFY: And so there's some --

13 THE COURT: You deposed him?

14 MR. MAHAFFY: Yeah, we've already deposed him. And
15 there's some existing testimony that we would like to be
16 designated as 30(b) (6) testimony under this topic. We're
17 otherwise willing to withdraw this --

18 THE COURT: What's the -- is that a -- so you took a
19 general deposition of that person?

20 MR. MAHAFFY: Right.

21 THE COURT: And the president. What's his name?

22 MR. MAHAFFY: Stephen Hoge.

23 THE COURT: Last name again?

24 MR. MAHAFFY: Hoge. H-o-g-e.

25 THE COURT: But your didn't designate Mr. Hoge as a

1 30(b), but you want to take some of the general deposition and
2 designate it as a 30(b)?

3 MR. MAHAFFY: Yeah, so we --

4 THE COURT: What's the -- why does that matter? It's
5 a deposition. It's information.

6 MR. MAHAFFY: We just want to make sure that, that is
7 Moderna's actual position and they're not going to try to say
8 something different than that.

9 THE COURT: This is the president. This is the
10 president.

11 MR. MAHAFFY: Fair.

12 THE COURT: If we call him 30(b) or we call him a CEO
13 or we call him the president, are you worried that what he said
14 in the deposition that wasn't a 30(b) won't be binding on that?

15 MR. MAHAFFY: I wouldn't expect that, but that's just
16 what we're trying to make sure of.

17 THE COURT: Did he identify himself and did you
18 depose him?

19 MR. MAHAFFY: I did not depose him.

20 THE COURT: All right. Did he identify himself as
21 president of Moderna?

22 MR. MAHAFFY: I believe so. I assume so.

23 THE COURT: Can I gently and respectfully suggest to
24 you, you're worrying about something you don't need to worry
25 about.

1 MR. MAHAFFY: Fair.

2 THE COURT: And if you're worried about the testimony
3 that you want to designate being binding on Moderna.

4 MR. MAHAFFY: It's a fair point, Your Honor.

5 THE COURT: I wouldn't worry about that.

6 MR. MAHAFFY: Okay.

7 THE COURT: Okay.

8 MR. MAHAFFY: So, the other aspect of this, is that
9 if we withdraw this, we just want to be sure that they're not
10 going to stand up at trial and give testimony on these
11 articles. So we would just ask that, you know, they not be
12 allowed to give testimony about the, you know, details of --

13 THE COURT: Got it.

14 MR. MAHAFFY: -- these articles about this topic.

15 THE COURT: Okay.

16 MR. MAHAFFY: And so we've --

17 THE COURT: Okay.

18 MR. MAHAFFY: I will say we've proposed this
19 compromise to them a few days ago and they --

20 THE COURT: Well let's propose it right now.

21 MR. MAHAFFY: Okay.

22 THE COURT: So as I understand it Mr. Mahaffy is on
23 the record withdrawing his request to have testimony about the
24 seven publications authored by Moderna scientists if Moderna
25 will represent now that they will not at trial attempt to

1 introduce any type of evidence related at all to these
2 publications. Is that your proposal?

3 MR. MAHAFFY: Yeah, the -- they won't offer testimony
4 that is within the scope of the topic that we proposed, yes,
5 which relates to the articles.

6 THE COURT: It's very broad. They won't -- how
7 about they won't offer testimony through any witnesses or
8 documents that relate to any content within these publications.

9 MR. MAHAFFY: Yeah. I think that's fair -- or -- and
10 I would say, you know, we wouldn't want them to testify about
11 the things that are short of unknown in the articles, right.
12 So the articles might talk about, you know, some aspect of the
13 manufacturing method.

14 We don't want them to stand up and say, oh well, you
15 know, these articles were actually manufactured by these other
16 means that are not disclosed in this article. We don't them
17 for them to get sort of extra testimony about the article that
18 we haven't had an opportunity to depose a witness on.

19 THE COURT: I mean we're -- what we're really talking
20 about is unfair surprise and it's really --

21 MR. MAHAFFY: Exactly.

22 THE COURT: -- it's really a trial issue. I mean you
23 could reserve this argument for trial and if they did it you
24 could say well we never got to depose them so sustain my
25 objection. Let's hear what Moderna has to say.

1 MS. CARSON: Your Honor, first of all, they -- there
2 was seven articles, We offered a 30(b) (6) on the only article
3 that actually deals with the COVID-19 vaccine. So they have
4 that testimony. The other six articles --

5 THE COURT: Did that person -- was that person
6 deposed on that one article.

7 MS. CARSON: Yes.

8 MR. MAHAFFY : Yeah, that's not an issue here. Yes.

9 THE COURT: We're talking about the six additional.

10 MS. CARSON: On the remaining articles they ask
11 questions about four of the articles. Two of the articles they
12 didn't even ask questions of any of our witnesses about. They
13 have taken 14 depositions, close to 85 hours and I will make a
14 correction. They're not out of time yet. They still have four
15 hours left, but they designated it for a deposition of the
16 government, so that --

17 THE COURT: The hidden message from Ms. Carson is the
18 CEO's deposition should be four hours.

19 MR. MAHAFFY: We are fine with that, Your Honor.

20 MS. CARSON: Well they have another deposition
21 they've already going to use the four hours for so.

22 THE COURT: I was kidding.

23 MS. CARSON: Choices.

24 THE COURT: Go ahead.

25 MS. CARSON: In any event, the point is, is that

1 they've had testimony on these articles. If they want to
2 impeach our witnesses at trial to say, well you didn't know
3 this at your deposition, fine, that's what impeachment is for.
4 But this is not an issue that they can say you're precluded
5 from ever saying anything about the articles, particularly
6 since they asked questions about the majority of the articles.

7 THE COURT: Yeah, that's -- I think she's right. I
8 mean it's very -- I'm very uncomfortable making rulings now
9 that relate to a trial that's not going to happen for -- what's
10 that trial date, like a year right, so.

11 MS. CARSON: 2025.

12 THE COURT: Yeah, so -- so let's -- let's do this,
13 Mr. Mahaffy. You're withdrawing -- you've had a deposition on
14 one of the articles. The other ones she says aren't related to
15 the virus at issue, right?

16 MR. MAHAFFY: Right.

17 THE COURT: Okay. So -- I mean I just think that's
18 were it should stand, because I don't know what someone -- I
19 don't like making rulings on things that haven't happen or may
20 not happen at trial and you're just going to have to stand up
21 at trial if you feel like you've been ambushed and say
22 objection. Remember, Judge, we withdrew this. They're now
23 talking about the other six articles and we withdrew it, we
24 didn't have discovery on it and I'll just try to do the right
25 thing then.

1 But if you've had one deposition and she's saying,
2 well this was on the virus at issue and the other six are sort
3 of tangential and I don't hear you pushing back on that.
4 Certainly Moderna doesn't have to make any guarantees right
5 now. You're just going to have to trust the process.

6 MR. MAHAFFY: Okay.

7 THE COURT: Okay?

8 MR. MAHAFFY: Understood, Your Honor.

9 THE COURT: Okay.

10 MR. MAHAFFY: Okay.

11 THE COURT: And thank you for being, you know, so
12 reasonable. I understand why you're trying to be so careful
13 about but -- so we'll -- I'll put some of my ruminations in the
14 order so it's clear so you could pull it out of your pocket if
15 they go -- if they cross the line at trial --

16 MR. MAHAFFY: Yeah.

17 THE COURT: -- you think has been -- is an unfair
18 line, okay?

19 MR. MAHAFFY: That's fair. Thank you, Your Honor.

20 THE COURT: I'll give you something to work with, all
21 right?

22 MR. MAHAFFY: Okay.

23 THE COURT: Okay.

24 MR. MAHAFFY: Thank you.

25 THE COURT: Okay. Who is going to address for or

1 review this issue regarding Moderna's communications with the
2 government.

3 MR. MAHAFFY: I will, Your Honor.

4 THE COURT: Okay, so could you frame that for me
5 please?

6 MR. MAHAFFY: So, Your Honor, this relates to Topic
7 50 in our 30(b) (6) notice and as Your Honor will surely recall,
8 Moderna is asserting that certain sales of it's product are
9 covered by government contractor defense in Section 1498. And
10 after Your Honor decided the motion dismiss, the government
11 then belatedly filed a statement address regarding that issue.

12 And the scope of Topic 50 that Moderna has not agreed
13 to that's really in dispute is, we -- we want to be able to
14 take discovery about their communications with the government
15 and their involvement with that statement of interest, their
16 discussion of the application of 1498 to our case and any
17 involvement they have with drafting it.

18 THE COURT: Drafting what?

19 MR. MAHAFFY: Drafting the statement of interest to
20 the government client.

21 THE COURT: And how would that be relevant to the
22 issues we're going to litigate at trial?

23 MR. MAHAFFY: So, for two reasons, Your Honor. One
24 is the Moderna is relying on that statement of interest as I
25 would dare say their primary piece of evidence in favor of the

1 application of 1498. And so all we're saying is, we should be
2 entitled to take discovery of that to see if in fact they had a
3 role in manufacturing that piece of evidence, which I think
4 would be relevant to Your Honor and to the jury.

5 THE COURT: Statement of interest?

6 MR. MAHAFFY: The statement of interest and the
7 discussions that they had with the government about whether
8 1498 applies. Whether theses doses that we're talking about
9 were actually for the government as opposed to for the American
10 people. Those conversations on what Moderna was saying and
11 what the government was saying frankly in those communications
12 are directly relevant.

13 And the second thing I would say about that, Your
14 Honor, is it's hard for me that the one motion that Moderna
15 filed on -- relating to what they call lobbying communications.
16 I -- you know -- if you look at what they said there. It's
17 hard to conceive of how they could still contest the relevance
18 of this testimony given what they said. They said that our --
19 and what we're talking about there are our after the fact
20 lobbying documents to raise awareness of 1498.

21 They've said those statements made by plaintiff or
22 Roivant to members of Congress in an effort to tilt the
23 licensing positions more favorably toward plaintiffs are at
24 least relevant to Georgia Pacific Factors 10 and 11. They're
25 also relevant to the extent they undercut plaintiffs' unfounded

1 assertions that Moderna improperly influenced the U.S.
2 government regarding the application of 28 U.S.C. 1498 and the
3 pricing of Moderna's COVID-19 vaccine.

4 THE COURT: So they're talking about your lobbying
5 efforts there.

6 MR. MAHAFFY: Right and --

7 THE COURT: So what I -- sorry to interrupt -- but
8 what I'm very fuzzy on. I'm going to turn it over to Moderna,
9 whoever wants to speak, is the -- so you can have a seat for a
10 second.

11 MR. MAHAFFY: Okay.

12 THE COURT: So the supply chain and how this -- how
13 this worked. So as a person who received the vaccine. I think
14 it was even Moderna's. I showed up at a vaccination center and
15 I got the vaccine and since then with boosters -- I don't know
16 whose booster I got -- I showed up at a pharmacy. So what I'm
17 very unclear about is, how did -- what was the supply chain?
18 How did this work? From Moderna's production center to the --
19 to the arms.

20 MR. McLENNAN: Good morning, Your Honor. Mark
21 McLennan for Moderna. So --

22 THE COURT: McLennan?

23 MR. McLENNAN: McLennan.

24 THE COURT: Yeah. Spell that.

25 MR. McLENNAN: M-c-L-e-n-n-a-n.

1 THE COURT: Do you -- are you pretty clear, Mr.
2 McLennan, what I want you to explain to me?

3 MR. McLENNAN: Yeah, sure. So let's start with the
4 pandemic here. The government and several departments, the
5 Department of Defense, the NAH contracted with multiple
6 companies to rapidly produce and manufacture vaccines and scale
7 up to be able to supply by the end of the year. Moderna was
8 one of those companies. They entered into that supply
9 contract. As part of that supply contract there was the back
10 and forth about 1498, which I'll come back to.

11 THE COURT: Contract between?

12 MR. McLENNAN: Moderna and the government.

13 THE COURT: Okay.

14 MR. McLENNAN: With the Department of Defense.

15 THE COURT: Okay.

16 MR. McLENNAN: That was the supply agreement that
17 contained the indemnity provision that we've been speaking
18 about. But to answer your question about the supply chain,
19 Moderna then supplied the vaccine to the government. It was
20 supplied to central distribution centers and then the
21 government decided under emergency use authorization, because
22 it's not approved at the time. The government is using it as a
23 counter measure to a pandemic. The government then directed
24 that to sites around the country. So --

25 THE COURT: To what?

1 MR. McLENNAN: To sites, like as in pharmacies,
2 military sites --

3 THE COURT: Right.

4 MR. McLENNAN: Anyone who would administer the
5 vaccine.

6 THE COURT: So the actual vaccine is delivered to
7 some government owned --

8 MR. McLENNAN: Owned or operated.

9 THE COURT: -- property.

10 MR. McLENNAN: Owned or operated. Like the --

11 THE COURT: Owned or operated.

12 MR. McLENNAN: -- specific pharmaceutical
13 distributors that --

14 THE COURT: Okay.

15 MR. McLENNAN: -- are specialist in this.

16 THE COURT: And it's either -- it's either
17 administered there -- the first doses were either administer
18 there or some dosage administration site close to that.

19 MR. McLENNAN: More so like there's the distributors
20 that the government was controlling and then went out from
21 there. Obviously there are probably tens of thousands of
22 places from there. Like CVSs, schools -- any -- you know --
23 there's vaccination sites.

24 THE COURT: Right.

25 MR. McLENNAN: But it was all coordinated by the

1 government.

2 THE COURT: So from you to the government to we'll
3 call them, you know, private entities like CVS.

4 MR. McLENNAN: Yeah, but that's all under one
5 contract though. At some point it did turn -- there was
6 another contract after that.

7 THE COURT: Mm-mm.

8 MR. McLENNAN: And now there's different supply
9 arrangements, but we're talking about the early period of the
10 pandemic.

11 THE COURT: So for the first contract, whose the --
12 who paid for all those vaccines?

13 MR. McLENNAN: The Department of Defense.

14 THE COURT: Okay. And did the Department of Defense
15 ever seek reimbursement. Let's say just -- because we're
16 talking in very generalities from let's say CVS. So CVS didn't
17 administer it so CVS is out of the picture at that point,
18 right?

19 MR. McLENNAN: My understanding is I would've
20 checked, but my understanding is that the government was buying
21 those vaccines and supplying it to the public.

22 THE COURT: Okay. Okay. All right. That's sort of
23 what I thought, but that's changed, you know, as time went on
24 and there was direct supplies from your client to entities
25 using my example of CVS, right, and the government was taken

1 out of -- eventually taken out of the loop. Is that right?

2 MR. McLENNAN: Essentially that's right.

3 THE COURT: Okay. All right. So thank you. I'll go
4 back to you now Mr. Harber. So where were you?

5 MR. HARBER: So the -- Your Honor, I was reading
6 portions from the motion that Moderna filed saying that somehow
7 our -- things that our company said about 1498 after all the
8 relevant facts had occurred. Those are somehow relevant, but
9 what they're trying to do is shield both testimony and
10 documents about what they were saying and discussion they were
11 having about 1498 at the time in the room when the decisions
12 were being made. And --

13 THE COURT: With?

14 MR. HARBER: With the government. With the
15 Department of Justice with the government and that -- we think
16 that's incredibly improper given their reliance on --

17 THE COURT: Give me an example. If you get to do
18 this additional discovery, give me an example of something that
19 you would be -- you think would have very high evidentiary
20 value for your client in this patent case.

21 MR. HARBER: So two things, Your Honor. One is,
22 let's say there was a dispute and a disagreement between the
23 government and Moderna about whether 1498 applies. And what
24 the government said in that context, before the statement of
25 interest was filed is identical to the arguments that we are

1 making that we made a response to the motion to dismiss or did
2 we make in response to what I'm sure will be a summary judgment
3 motion. It's incredibly valuable for us to be able to point
4 out that, that was the governments position before whatever
5 influence that Moderna had.

6 THE COURT: Who do you think was the highest level
7 government official to have these discussions with Moderna?

8 MR. HARBER: We don't. I think on the statement of
9 interest in particular, it was some -- my assumption would be
10 it's somebody with the Department of Justice. But right now
11 Moderna -- it is a -- it has been a stone wall for us to --

12 THE COURT: All right, let's pick -- let's use the
13 term official from the Department of Justice.

14 MR. HARBER: Right.

15 THE COURT: And you think there could be information
16 out there that the official from the Department of Justice said
17 something like, this really isn't for the government, this is
18 for the citizens and that to you would be a smoking gun that
19 they're affirmative defenses is not worth anything, right?

20 MR. HARBER: I think we're talking in sort of
21 hyperbolically about what --

22 THE COURT: Of course we are.

23 MR. HARBER: -- the document would be.

24 THE COURT: Yes, we are definitely doing that.

25 MR. HARBER: So I don't -- I'm not pollyannaish

1 enough to believe that, that exact document is there, but there
2 could've been discussions back and forth about whether or not
3 this legal theory applies.

4 THE COURT: Okay, so let's say you have that
5 statement, whatever it is. You think it's valuable, right?

6 MR. HARBER: Yes.

7 THE COURT: Okay, so I would -- I would just sort of
8 in discussion with you say, you know, not glibly, respectfully,
9 but so what. So I made the decision as to whether the 1498
10 applies and whether it fit -- the evidence fits under was it
11 for the government and with authorization and consent of the
12 government and a statement by the highest level official. That
13 doesn't mean that it's true. I have to decide that based on
14 that evidence.

15 MR. HARBER: And I appreciate that and I hope that
16 that's Your Honor position and I think that's the right
17 position, but I -- it's not clear to me that this won't for
18 example be an issue where there's a fact dispute that gets to a
19 jury. And I think that the jury would want to know. It
20 shouldn't just be Moderna waving around the statement of
21 interest and saying, look, here's what the government said.

22 THE COURT: Mm-mm.

23 MR. HARBER: And us not being able to point out, well
24 look you see the sentence on Page 3 that they told the jury
25 about. It turns our Moderna was the one who wrote that.

1 THE COURT: You're looking at it sort of like as an
2 admission. Not -- I see it more where you're saying there's
3 more -- are there any admissions as opposed to, well some high
4 level official said if members of the jury are judged so
5 therefore it must be true. It's sort of like -- you know --
6 that's just an opinion of someone else. The clock stop here, I
7 think. Have you gone to the government and asked them?

8 MR. HARBER: They have refused to give us anything.
9 Their position is Moderna is the party in the case and so if
10 you want our discovery about our communication with Moderna you
11 have to get it from them, which is not --

12 THE COURT: Well did you --

13 MR. HARBER: -- completely unfounded. And we're
14 trying.

15 THE COURT: I'm not nearly as immersed in this as you
16 but did you hit the government with a subpoena?

17 MR. HARBER: We have. We're negotiating that.

18 THE COURT: And what did they say?

19 MR. HARBER: Their position has been consistently and
20 it's supported some law that if -- you should not burden a
21 third party with a discovery request of something you can get
22 from a party and that's what we're talking about.

23 THE COURT: How do you want to get this discovery,
24 which I'm now better understanding to be any communications
25 regarding statute 1498, right. The 1498 that Moderna had with

1 any government official. Is that a good --

2 MR. HARBER: That and the statement of interest which
3 I think probably would be subsumed within the first category,
4 but yes.

5 THE COURT: All right.

6 MR. HARBER: And so we -- there's two pending
7 requests before Your Honor. One is this -- we're asking for
8 30(b) (6) testimony. The other is we've asked for the documents
9 about this. And so -- and again, they've shared no information
10 with us on the scope. They haven't given us the privilege log.
11 They haven't -- I don't know whether we're talking about
12 hundred of documents, ten documents or what, because they
13 haven't given us that information. The -- I will say --

14 THE COURT: Suppose -- didn't the statement of
15 interest come after I denied their motion and then the
16 statement of interest --

17 MR. HARBER: Correct.

18 THE COURT: -- and then I wrote a supplemental paper.

19 MR. HARBER: That's correct.

20 THE COURT: Okay. So suppose counsel -- if there
21 were communications with the government after my initial
22 opinion, don't you think those communications would've been
23 between lawyers? They probably would've been.

24 MR. HARBER: Well they would've been, but this is
25 where -- their argument is basically we had a common interest

1 privilege with the U.S. government even though we won't produce
2 to you the common interest agreement. We won't produce to you
3 any other evidence about it and we won't -- they've now --
4 we've had several briefs on this issue to the Court and they
5 haven't cited a single legal case justifying that this is a
6 protectable common legal interest.

7 The issue is, Your Honor understands from ruling on
8 motions dismissed. The entire legal issue for 1498 is there
9 are two parties. Moderna and the U.S. government and which one
10 has to pay the damages for Moderna's patent infringement.
11 Either the government or Moderna. The notion that there's a
12 common legal interest on that where the -- the interest of the
13 -- the legal interest of the parties are polar opposites. It
14 defies logic and it defies that case law to the point where
15 they won't even -- there's been no attempt to defend that
16 there's a common interest over that.

17 THE COURT: Mr. McLenahan -- McLennan?

18 MR. MCLENNAN: McLennan.

19 THE COURT: McLennan. Are you addressing this issue?

20 MR. MCLENNAN: Yes, Your Honor.

21 THE COURT: Okay, what evidence if any understanding
22 we're far away from trial, but what evidence if any do you
23 intend to put in front of the jury or let's just say the fact
24 finder regarding the government's view on were the vaccines for
25 the government with their authorization.

1 MR. McLENNAN: Okay, so something that wasn't
2 mentioned at all in that previous argument was the supply
3 contract that I mentioned earlier, Your Honor. We call it the
4 C100 Contract. That was entered into years before the lawsuit
5 was filed in August 2020. That contract was what formed the
6 basis for Moderna's motion to dismiss. Your Honor might recall
7 it was a redacted --

8 THE COURT: I do.

9 MR. McLENNAN: -- contract. And Your Honor found
10 that, well I need more information about whether the
11 government's decision to include a specific clause in there.
12 An authorization and consent clause was actually consent
13 because there wasn't enough information available.

14 THE COURT: I reread it this morning so go ahead.

15 MR. McLENNAN: Okay. What Mr. Harber also didn't
16 mention was, he deposed the lead person of Moderna who was
17 responsible for negotiating that contract. He took the
18 deposition. I defended it. The witness went through many,
19 many e-mail and we produced where Mr. Harber was able to see
20 all the back and forth with the government about, here's a
21 draft contract, I propose this clause, we would like this in
22 there, all the back and forth. They have all that. That is
23 Moderna's basis for --

24 THE COURT: But you haven't answered my question.

25 MR. McLENNAN: I think Your Honor asked about what

1 evidence we'd rely on.

2 THE COURT: What evidence are you going to produce
3 understanding I'm not holding you to this.

4 MR. McLENNAN: Yeah.

5 THE COURT: Just a brainstorm with you. What
6 evidence do you intend to produce at trial regarding your
7 affirmative defense under 1498 that the -- or maybe it's not a
8 trial, because if I agree with you it has to shift to another
9 court, right.

10 MR. McLENNAN: Yeah, you --

11 THE COURT: So what evidence are you going to produce
12 in summary judgment would be a prominent better question than
13 the vaccines were for the government with their authorization.

14 MR. McLENNAN: So on that authorization consent
15 point, it is the contract. The case has recognized that
16 including that specific FAR clause in the clause in the
17 contract is authorization and consent. That's why I brought
18 you to the contract.

19 THE COURT: That's it. That's all you're going to
20 come to me and say.

21 MR. McLENNAN: We've also got -- I'm sorry, Your
22 Honor. I didn't mean to cut you off.

23 THE COURT: I interrupted.

24 MR. McLENNAN: We've also got a ton of e-mails back
25 and forth with the government showing that they knew this

1 clause was in there, how it got in there, things like that. We
2 produced those. Witnesses have been deposed about it. They
3 understand that. We'll rely on those.

4 THE COURT: My question though -- but my question is,
5 what evidence are you going to produce at summary judgment to
6 convince me that this case should go to the claims court, that
7 the vaccines were for the government with the authorization?

8 MR. McLENNAN: So the -- I've already addressed the
9 authorization and consent. It's the --

10 THE COURT: The contract.

11 MR. McLENNAN: -- the contract.

12 THE COURT: You said that.

13 MR. McLENNAN: Yes.

14 THE COURT: What else?

15 MR. McLENNAN: And then the statement of interest
16 that Mr. Harber referred to. The statement of interest just
17 recognizes -- as the government said -- in that contract we
18 gave authorization and consent.

19 THE COURT: Are you going to call a witness from the
20 -- from the -- are you going to introduce a deposition or an
21 affidavit from some high level government official at --

22 MR. McLENNAN: No.

23 THE COURT: -- the Department of Justice?

24 MR. McLENNAN: No, we've not subpoenaed the
25 government, Your Honor. Because the -- our position is, it's

1 clear in the face of the contract. All the statement of
2 interest did was just refer back to it and say yes that is in
3 the contract. We do provide authorization and consent. And
4 for the other prong --

5 THE COURT: It sounds like you're saying to me in
6 support of your affirmative defense, you're just going to offer
7 the contract.

8 MR. McLENNAN: Sorry, for the benefit prong, Your
9 Honor, is separate. Where again, we've produced a mountain of
10 evidence about that. A number of people have been deposed.

11 THE COURT: Can you tell me how much you produced and
12 I want to look at this in --

13 MR. McLENNAN: Okay.

14 THE COURT: -- terms of what is going to happen at
15 the trial. Because if you're just going to rely on the
16 contract or the motion for summary judgment part of the case.
17 However we decide this affirmative defense. It seems to me --
18 maybe I should backtrack -- it seems to be that needs to be
19 decided in the first instance, because then it goes to a
20 different court if I agree with you. Is that right?

21 MR. McLENNAN: I'm not sure on the specifics.

22 THE COURT: You don't want it in a district court.

23 MR. McLENNAN: I don't have the -- I don't have the
24 -- I'm not sure about the appeal procedure.

25 THE COURT: I thought --

1 MR. McLENNAN: Is that -- sorry is that what --

2 THE COURT: -- the whole premise of this is, if I
3 decide -- let's back up because I'm getting myself confused.

4 You came to me and said send this to the claims court.

5 MR. McLENNAN: Part of the case.

6 THE COURT: Okay. And I said it's premature because
7 discovery has to be developed. So we've developed the
8 discovery and then you're going to come to me, I presume, with
9 a summary judgment motion saying, look we've developed the
10 discovery. You said we're are the pleading stage.

11 MR. McLENNAN: Yeah.

12 THE COURT: We're now -- have a developed record.

13 This part of the case, big part of the case I presume, goes to
14 a different court, right? Am I right so far?

15 MR. McLENNAN: Correct.

16 THE COURT: Okay. So my question is, as clear as I
17 can state it, what evidence are you going to put before me to
18 convince me that that's what should occur. And the reason I'm
19 asking that is, I think that, that informs my decision on how
20 much discovery should be allowed.

21 MR. McLENNAN: Understood, Your Honor.

22 THE COURT: Okay.

23 MR. McLENNAN: I think aside from what I've already
24 said for the benefit prong we'll be relying on specific
25 evidence. It will be specific. Evidence we'll produce that

1 shows the vaccine that Moderna produced and sold to the
2 government actually was given to the government. So getting
3 good due received is a benefit. There's also a lot of
4 testimony and documents --

5 THE COURT: Well how are you going to -- how are you
6 going to -- what evidence are you going to present in the
7 summary judgment record if that's the right motion to show
8 that?

9 MR. McLENNAN: So we've produced other witnesses who
10 testified about batch tracking records showing that specific
11 batches, these specific doses went to the government. They
12 deposed witness about them. They understand these spread
13 sheets now. I think they also got similar spreadsheets from
14 the government.

15 THE COURT: Evidence has already have been developed
16 in the running.

17 MR. McLENNAN: Correct.

18 THE COURT: And Mr. Harber knows about it.

19 MR. McLENNAN: Correct.

20 THE COURT: Okay.

21 MR. McLENNAN: And then other evidence just about the
22 benefit to the government in general. Like having a vaccine
23 out there that helped prevent the spread -- helped the
24 government --

25 THE COURT: And is this other evidence been produced

1 yet?

2 MR. McLENNAN: Yes. It has, Your Honor.

3 THE COURT: Okay. All right. So the contract --
4 you're answer is -- and I'm not trying to put words in your
5 mouth -- the answer is, the contract, which everyone knows and
6 everyone has a redacted version of it I guess, right?

7 MR. McLENNAN: Unredacted. Unredacted.

8 THE COURT: Unredacted.

9 MR. McLENNAN: Yes.

10 THE COURT: Okay. And evidence has already been
11 developed and is in the running, right?

12 MR. McLENNAN: Right.

13 THE COURT: And I'm not going to produce an affidavit
14 from a high level person from the Department of Justice that
15 Mr. Harber gets -- hasn't deposed yet, right? You're not going
16 to do that, right?

17 MR. McLENNAN: No, I mean --

18 THE COURT: Okay.

19 MR. McLENNAN: -- they're going depose someone from
20 the government. I don't know what topics are going to come up
21 but we'll have equal opportunity to depose that person. That's
22 --

23 THE COURT: When you're ready to go --

24 MR. McLENNAN: We're not holding anything back.

25 THE COURT: You're ready to convince me now on the

1 record as it stands that this is produced for the government
2 with their authorization consent, right?

3 MR. McLENNAN: The only -- out of fact discovery --
4 yeah that's right, Your Honor.

5 THE COURT: So I'm going to hold all of this under
6 advisement, but I'll give -- thank you -- I'll ask Mr. Harber
7 if he can have the last word on this. He's been very clear
8 about what he's going to rely on so why do I open the door to
9 more?

10 MR. HARBER: So two reason's, Your Honor. It is --
11 it's all well and good what Moderna wants to rely on, but we
12 get to put a defense up as well. And one of the things that
13 Mr. McLennan said was --

14 THE COURT: Mr. McLennan, you can have a seat.

15 MR. HARBER: One of the things Mr. McLennan said was,
16 we're going to rely on the statement of interest. And that's
17 our point. They don't need an affidavit from the government,
18 because what they're going to say is here's the governments
19 position and it's not just -- I think we're conflating two
20 issues there. There are two prongs to 1498. There's the
21 authorization to consent and then there's whether it was for
22 the government.

23 We don't dispute that the authorization of consent
24 clause was in that first contract. That's not a point of
25 dispute in the case. The point of dispute is for the

1 government prong. That was for some reason address in the
2 government statement of interest. We would like to take
3 discovery about how that came to be. What was Moderna saying?
4 What was the discussion about? Whether that was in fact for
5 the government and there could be useful admissions that we
6 would use as evidence regardless of what Moderna is going to
7 use in evidence. That's what we're seeking.

8 THE COURT: I understand your position. Okay. I
9 want to think about it a little bit.

10 MR. HARBER: All right. Thank you.

11 MR. McLENNAN: Your Honor, would I be able to just
12 address the statement of interest a little bit more.

13 THE COURT: Sure.

14 MR. McLENNAN: I think there is -- you know, where
15 this started out is after Your Honor denied that the government
16 put in the statement of interest, there was a series of, you
17 know, conspiracy theories about, well maybe Moderna offered
18 something or gave something in exchange for the statement of
19 interest.

20 THE COURT: Where were these conspiracy theories
21 offered?

22 MR. McLENNAN: In a brief before the second decision.
23 And so Your Honor said, we need discovery. We've had
24 discovery. Mr. Harber deposed a witness on it. The business
25 people at Moderna confirmed there was nothing offered in

1 exchange for it. We -- we've given them the discovery on this.
2 It wasn't something that Moderna solicited. But to ask for
3 counsel's e-mails to collect Kirkland and Ellis' e-mails. To
4 collect in house counsel's e-mails for the Department of
5 Justice is something that I think that as Your Honor recognizes
6 is clearly privileged and covered by common interest.

7 THE COURT: Well I didn't say that.

8 MR. McLENNAN: It's -- after the suit has been filed
9 neither of the parties required to log those communications, so
10 I just want to make it clear any suggestion we haven't provided
11 a log for something that we should have. It's just not
12 correct.

13 THE COURT: Okay.

14 MR. McLENNAN: This is counsel's communications with
15 a party that we have an -- an interest with in defending a loss
16 of our patent infringement.

17 THE COURT: I understand everyone's position on this.
18 I want to move on to the next topic.

19 MR. McLENNAN: Okay. Thank you, Your Honor.

20 THE COURT: And just give me a moment to check my
21 notes here. All right, I'll give whoever wants to speak from
22 Arbutus time to talk about the foreign sales issue.

23 MR. HARBER: Thanks, Your Honor. Hello again. The
24 -- so, Your Honor, I won't belabor the history of this which
25 is we've been asking for this discovery for some time. Your

1 Honor said serve an interrogatory attempting to narrow this.
2 If you have a basis to pursue further discovery, ask for the
3 document and come back to me if there's a dispute and that's
4 where we are.

5 The -- there are sort of two categories of
6 information we're requesting here. One is for the pre June
7 2021 contract that Moderna has entered into. It is clear that
8 -- we believe those are U.S. sales, but we at least have a
9 basis to take discovery and pursue the argument. And there are
10 details about the later contracts that Moderna's interrogatory
11 response was too vague for us to understand. And so we're
12 asking for those two things.

13 And I want to start with the pre June 2021 contracts.
14 The issue here -- I think to try to cut through everything,
15 Moderna's response to our brief reads as if we are arguing a
16 Rule 59 motion and we are not. We are arguing a discovery
17 motion. And the notion that there is not a basis for at least
18 us to pursue limited discovery that these are U.S. sales is
19 just groundless. The contract -- this is from what Moderna --
20 either from testimony we've taken or from what Moderna said in
21 their interrogatory response.

22 The contracts were negotiated by Moderna entirely
23 from the United States, because they had no one abroad. The
24 purchase orders were received and processed for these early
25 contracts in the United States. The contracts were executed by

1 U.S. employees in the United States for Moderna. There are in
2 many of these contracts what are called contingent actions. In
3 other words, if Moderna for some of them that we've cited in
4 the brief -- if Moderna doesn't get U.S. FDA approval then the
5 purchaser can back out of the contract. Those under the case
6 law, that's called a contingent action that is based on a U.S.
7 event.

8 There are specific orders that were negotiated from
9 the United States. Because for the time period we're talking
10 about, Moderna had no employees abroad. The marketing
11 activities all occurred from the United States during the early
12 time period, because Moderna had no one abroad. And all of the
13 design and clinical testing work for the products was done in
14 the United States, not abroad.

15 The notion that having shown all that based on the
16 limited discovery we have that we shouldn't be permitted to get
17 the contract, get the financial information and get any
18 technical or sample information on these contracts is baseless.
19 And I would turn -- you know the argument here is really
20 dispatched very well in a -- in the case that Moderna relied on
21 the last time we were before Your Honor on this. This is their
22 cited case.

23 Magistrate Judge Burke says, "The question is not
24 whether defendant has some facts on its side that it can later
25 use to argue the ultimate issue, nor is the question here

1 whether plaintiff can now definitely prove that these sales are
2 U.S. based sales. The question rather is whether plaintiff has
3 made a sufficient record to demonstrate relevance." And, Your
4 Honor, there's no question that we have on this. These are --

5 THE COURT: Okay. Go ahead.

6 MR. HARBER: We again, we tried to be targeted.
7 We've said in our motion the discovery we're seeking we've
8 tried to negotiate with Moderna if there's some scope of that
9 they flatly refused. They've made a big deal out of, well we
10 can't give you all the negotiation documents so stipulate the
11 negotiations were in the United States and we don't have to
12 take that discovery. But if they're going to contest that then
13 we should get to take discovery on it.

14 The -- Moderna's responses -- the one thing that I
15 would say in addition to they tried to mischaracterize the law
16 again. The mischaracterized arguments that we've made in our
17 motion or what the factors are. One example is -- well the
18 factor in the federal circuit's case law is where the purchase
19 orders were received and Moderna's motion says well they were
20 sent from abroad. That's not the test. By definition they
21 were sent from abroad, because you're always --

22 THE COURT: I'll figure out what the -- I'm familiar
23 with the Halo factor, sir. I'll figure it out.

24 MR. HARBER: The last point I want to address, just
25 briefly is, Moderna has now made the argument that, well we

1 have indemnity obligations to these foreign governments and it
2 may -- this may result in there being a bunch of foreign
3 governments who are entering appearances in the case. And as I
4 said , Your Honor, that's complete red herring.

5 Moderna has been on notice of our position for quite
6 some time. In the infringement allegations we've already made
7 there are batches that were manufactured in the U.S. and
8 provide to these governments that we've accused and there are
9 batches where components were made in the U.S. and exported
10 abroad.

11 Moderna has never said they -- none of those third
12 parties have come into the case and tried to assert themselves
13 or defend the case. So the notion that all of a sudden Moderna
14 is now going to do it, I think it would be untimely under Rule
15 14, but it is not a realistic thing that we're dealing with
16 here.

17 THE COURT: Okay. Who is going to respond? Jagger,
18 could you come here for a second. Good afternoon.

19 MR. EGAN: Good afternoon, Your Honor.

20 THE COURT: Remind me your name.

21 MR. EGAN: Brian Egan.

22 THE COURT: Okay, Mr. Egan, response?

23 MR. EGAN: Yes, Your Honor. I want to start by
24 taking issue with this assertion that Moderna is flatly
25 refusing discovery. Your Honor, we discussed this issue at

1 length at the February 22nd hearing.

2 THE COURT: The extent to which you didn't or did
3 compromise or what he offered. I'm not going to make my
4 decision based on that.

5 MR. EGAN: Yeah and I --

6 THE COURT: So move on to a substantive one.

7 MR. EGAN: Yeah, I'm not going to offer what --

8 THE COURT: Yeah.

9 MR. EGAN: -- you know, discuss what compromised
10 positions were.

11 THE COURT: It's impossible for a judge to figure out
12 who's -- you know, unless I had, you know, three days to do and
13 I could depose all of you and so what's you're substantive for
14 me?

15 MR. EGAN: Understood, Your Honor. In addition to
16 the lengthy interrogatory response that we provided, which we
17 think the interrogatory questions went well beyond just
18 threshold issues related to Halo. They effectively asked for
19 everything under the sun related to foreign sales and foreign
20 distribution. We provided reasonable response. We did an
21 extensive inquiry. We started by providing them an Excel
22 spreadsheet with every -- an identification of every contract
23 dealing with OUS sales and distribution.

24 Everyone of those contract is not with a Moderna U.S.
25 entity. It's with primarily with Moderna Switzerland. There's

1 also some agreements with Moderna Singapore and other Moderna
2 entities. But what you'll find in Halo and all the other
3 federal circuit decisions is that the inquiries, where was the
4 contract ultimately consummated. It's consummated by foreign
5 entities of Moderna. All of the sales. All of the
6 distributions were done abroad.

7 And what they keep trying to point out to Your Honor
8 and what they keep trying to rely on is everything that lead up
9 to the contract and that's what Halo tells you is not enough to
10 establish a sale under 271(a) and so this is really a
11 quintessential situation where, you know, you give plaintiffs
12 an inch and they're trying to take a mile.

13 THE COURT: Excuse me one second. Hey, Jagger.

14 Okay.

15 MR. EGAN: Okay. In addition to not only providing
16 them with an identification of every agreement of OUS sales.
17 Earlier this week -- it's not cited as an exhibit because it
18 was produced after the briefing, but I can provide Your Honor a
19 copy. We spent three months and I don't think anybody is going
20 to have a magnifying glass to go through all these pages.

21 But what we've shown in -- and for the record it's
22 mRNA Gen Document 2658257 -- we've provided them an
23 identification of every sale abroad, tied it to the OUS
24 contracts and show that all of those were manufactured outside
25 the United States, stored outside the United States and

1 distributed outside the United States.

2 None of those materials made their way back into the
3 United States and so where we're at in this argument is them
4 perpetually harping on well there was a person in the United
5 States that was involved in the contract negotiations. Or
6 there was a person in the United States that signed the
7 agreements. Well the agreements were signed on behalf of
8 Moderna Switzerland or on behalf of the other Moderna foreign
9 entities. They weren't signed on behalf of Modern U.S. or
10 Moderna Texas.

11 And so all they have is this information that Halo
12 and other federal circuit precedent tells you is not enough to
13 even meet the threshold for 271(a) for sale infringement. And
14 the fact that we've gone to the lengths that we already have to
15 effectively prove the negative. We believe we've gone above
16 and beyond what Your Honor even required based on your order on
17 February 27th, where at the close of fact discovery. And the
18 fact that they say that, you know, issues like the
19 indemnification provisions or red herring. It's absolutely not
20 a red herring.

21 We have even in the agreements that are attached to
22 exhibits to their motion, it's Exhibit 7 through 11. You'll
23 find provisions number one, that we have to step through a
24 procedure with each foreign government to even disclose these
25 agreements. And second, there's full recited indemnification

1 provisions with each of these foreign governments. And what
2 that means is that, if plaintiffs are going to sweep these
3 allegations into the case now with the close of fact discovery,
4 we have to deal with those provisions and whether or not those
5 foreign governments are going to step in and basically take a
6 position in this case based on those indemnifications
7 provisions.

8 And so, you know, we certainly take issue with any of
9 that being a red herring. It's basically blowing open
10 discovery after fact discovery already closed. It's going to
11 take months to work through all those provisions and simply
12 it's too late at this time to reopen discovery on these issues.

13 THE COURT: Where is Moderna, Incorporated, Delaware?

14 MR. EGAN: Yes, sir.

15 THE COURT: Okay. And -- I was just curious.

16 MR. EGAN: Moderna U.S.

17 THE COURT: Yeah, okay. All right, thank you. And I
18 think there's one other -- who is addressing Moderna's request
19 for more information, which I think pertains to lobbying
20 materials for Arbutus.

21 MR. McLENNAN: I am, Your Honor. Mark McLennan.

22 THE COURT: All right, let me just review my notes
23 for a second.

24 MR. McLENNAN: Sure.

25 THE COURT: All right, I think your request pertains

1 to lobbying materials -- I think that's a term you used -- with
2 Congress on the part of Arbutus and Roivant. You probably have
3 to remind me how Roivant fits.

4 MR. McLENNAN: So --

5 THE COURT: And then -- you know, I would just
6 observe -- I mean -- lobbying material -- lobbying -- if I
7 asked you to define lobbying it would -- go ahead define.
8 What's lobbying? What is it?

9 MR. McLENNAN: Lobbying, pressing members of Congress
10 to advocate for certain legislative action to be taken.

11 THE COURT: Yeah, good -- good definition. Okay. So
12 how would that be relevant in a patent case.

13 MR. McLENNAN: So, Your Honor, both sides have
14 actually agreed to produce documents about lobbying. I think
15 the only hold up is plaintiffs aren't willing to provide their
16 lobbying materials until Moderna produces its --

17 THE COURT: How would that be relevant to a patent
18 case?

19 MR. McLENNAN: In this particular case, one of the --
20 I don't want to go into plaintiffs' confidential information,
21 but one of the exhibits to our motion shows that the way
22 plaintiffs have use lobbying is as a licensing tactic. I don't
23 know, I probably shouldn't go into further detail about that
24 without revealing anything, but essentially that's what we've
25 raised in our motion is that it's relevant to damages, because

1 both parties --

2 THE COURT: How does -- so based on your definition
3 -- I'm having a disconnect. Because your definition, which I
4 thought was really good. I probably be able to repeat it back
5 as well as you said it, but it's persuading a member of
6 Congress regarding a pertinent piece of legislation that is of
7 interest to the client of the lobbyist. How does that fit with
8 licensing which -- you know, when you say licensing then I
9 start to tune in a go, okay now we're talking about a patent
10 case.

11 MR. McLENNAN: Yeah.

12 THE COURT: So there -- explain that to me. There's
13 lobbyist that go to members of Congress and advocate about
14 legislation regarding licensing?

15 MR. McLENNAN: Would we be able to do a sidebar? Is
16 that possible? I just don't step into plaintiffs' confidential
17 information. Is that possible or I could just confer quickly
18 to see if he's have an objection with --

19 THE COURT: Yeah, why don't you confer.

20 MR. McLENNAN: So just to keep it high level again,
21 just as attached to our brief --

22 THE COURT: Sure.

23 MR. McLENNAN: -- but what we've attached is over a
24 number year plaintiffs have used either PR campaigns or
25 lobbying activities in part to sway public opinion to be able

1 to bring Moderna to the negotiation table to obtain all of
2 there patent license to plaintiffs' technology.

3 THE COURT: No, I thought your definition was to sway
4 members of Congress as it relates to legislation.

5 MR. McLENNAN: It was, Your Honor. So with 1498 in
6 particular with -- you know, there's been deposition testimony
7 about some efforts that are taking place. There's been a lot
8 of recent public articles that plaintiff is relying on now by
9 members of Congress. Putting out articles about Moderna and,
10 you know, why 1498 should apply. Things like that. The more
11 challenging they can make it for Moderna in court of public or
12 about, you know, application of 1498, that is a tough licensing
13 tactic in other words.

14 THE COURT: I was with up until the -- well I
15 understood what you were saying up until that last part. I'm
16 still unclear how any of that becomes relevant in a patent
17 trial, but we need to make some tough regarding licensing.

18 MR. McLENNAN: So if the, you know, if the I guess
19 litigation becomes more challenging or if there's public
20 pressure in terms of like media articles, things like that.
21 That may bring Moderna to the negotiating table and these are
22 words from some -- I mean I don't want to quote from
23 plaintiffs' documents, but this is some of the information
24 that's come out.

25 THE COURT: It's fascinating. So you think or you

1 have information and you all agree to exchange this
2 information. Lobbyist are hired by pharma companies to go to
3 influential legislators to disparage competitors and that makes
4 it harder to get licenses.

5 MR. McLENNAN: Essentially and --

6 THE COURT: This happens? Go ahead.

7 MR. McLENNAN: -- and, Your Honor, both parties have
8 agreed to give that category of lobbying documents. Both
9 parties agreed.

10 THE COURT: Yeah.

11 MR. McLENNAN: We just haven't got plaintiffs yet,
12 because --

13 THE COURT: I know. I know. Say that both parties
14 agree though.

15 MR. McLENNAN: Yeah.

16 THE COURT: I want to understand -- what I'm trying
17 to do, maybe unsuccessfully is just understand how all of this
18 fits into a patent trial where there's three issues.
19 Infringement, invalidity and damages and -- I just don't under
20 -- you -- you're all smarter than me in this area so -- or you
21 know a lot more about than I do. I just don't understand how
22 disparaging to legislatures has any relevance to the trial
23 we're going to have.

24 MR. McLENNAN: So, Your Honor --

25 THE COURT: Whether you agreed or not.

1 MR. McLENNAN: You mentioned damages. So part of the
2 damages analysis is there -- if Moderna is found liable,,
3 there's a hypothetical negotiation between Moderna and
4 plaintiffs. What you heard from plaintiffs earlier this
5 morning, well we need to delve into Moderna's discussions with
6 plaintiffs ten, 12 years ago, because that might be relevant to
7 how this hypothetical negotiation would go down.

8 THE COURT: Okay.

9 MR. McLENNAN: Discussion between plaintiffs and
10 Moderna. If somehow these other activities like PR campaigns
11 are part of the licensing tactics during potential licensing
12 negotiations --

13 THE COURT: Yeah.

14 MR. McLENNAN: -- between the parties. These are
15 actual things that have happened. That is also relevant to the
16 hypothetical negotiation, because it's facts about how that
17 negotiation would take place.

18 THE COURT: And how are you going to prove that. So
19 let's say you have an article that was generated through
20 lobbying efforts that completely disparages your client. How
21 is that introduces at trial?

22 MR. McLENNAN: Seeing position -- so --

23 THE COURT: An expert?

24 MR. McLENNAN: Possibly and expert. Maybe fact --

25 THE COURT: And is this is what I relied on?

1 MR. McLENNAN: -- fact witness testimony too.

2 Essentially in those communications too, we're expecting there
3 are going to be statements about plaintiffs technology too.

4 THE COURT: Mm-mm.

5 MR. McLENNAN: And why, you know, they think Moderna
6 stole it. Why it's valuable. Everything like that. One of
7 the factors is valuable technology.

8 THE COURT: I'm happy to show my ignorance. And is
9 there any lawyer in this room who has been part of a trial
10 where a article generated by a lobbyist has been introduced
11 regarding damages? Raise your hand.

12 (No audible response)

13 THE COURT: Okay. It just seems so attenuated to me,
14 but anyway. I'm trying just to understand, you know, what
15 happens. So thank you. That's informative. And you want
16 getting -- I'm trying to refocus myself in my thinking here.
17 You want what from them that you haven't received.

18 MR. McLENNAN: So with both parties -- at the hearing
19 a couple months ago we had a discussion with Your Honor by
20 phone. We spoke about this category. You said go and work out
21 search terms. The parameters of lobbying.

22 THE COURT: I understand.

23 MR. McLENNAN: Sorry?

24 THE COURT: I understand.

25 MR. McLENNAN: Oh no, no, no, sorry. You said go

1 back and discuss search terms and, you know, the categories of
2 lobbying discovery that we provided.

3 THE COURT: Okay.

4 MR. McLENNAN: So we went back and did that. We've
5 reached agreement.

6 THE COURT: Mm-mm.

7 MR. McLENNAN: The hold is plaintiffs have said, well
8 we're not going to give you our lobbying materials until you
9 give us, not lobbying, but communications about application of
10 1498. So not even lobbying, so it would encompass the same
11 communication we heard about earlier say for example if there
12 were communications between Moderna's outside counsel and the
13 Department of Justice about 1498. We have to hand over all of
14 those privilege communications --

15 THE COURT: Mm-mm.

16 MR. McLENNAN: In order to get this separate category
17 of lobbying materials that both parties have agreed to what
18 we've termed reciprocal information. That's essentially where
19 we're at.

20 THE COURT: Okay. Understood. I mean maybe the
21 lawyers have got to rethink their mutual agreement and to say
22 whether it's really worth fighting over and whether it's really
23 going to matter in the ultimate outcome of this case, which is
24 again infringement in validity and damages. Who is going to
25 responds for Arbutus? Thank you.

1 MR. HARBER: Thank you, Your Honor. A couple of
2 points. One is I want to start by addressing what I think is a
3 complete misrepresentation of the facts and what the documents
4 show about what lobbying Arbutus or plaintiffs were doing. The
5 exhibit that's attached to the discovery letter by Moderna is a
6 proposal that was sent years ago to Arbutus about a quote,
7 unquote, "pressure campaign" as they call it. No one ever
8 retained that firm. No one ever did anything there. Moderna
9 took the testimony from a 30(b) (6) testimony from a witness
10 from Arbutus who confirmed that.

11 THE COURT: What's a pressure campaign?

12 MR. HARBER: I don't even know. It's a -- Moderna
13 has raised this and introduced this term. It's not -- that's
14 not what -- no one was engaged in that in the exhibit Moderna
15 put in there. Now what we're discussing here are on the one
16 hand, what Moderna wants is any efforts to raise public
17 awareness of 1498 after the complaint was filed. So this is
18 not at a time -- it doesn't effect the hypothetical
19 negotiation. It's all later. It's all after the lawsuit. And
20 they've set out a bunch of arguments, both in their argument
21 here and in their brief about why think that's relevant.

22 They think it's relevant to -- it undercuts our
23 position about that there was some influence by Moderna on the
24 government. That's the same quote that I raised before. What
25 they won't agree to produce and what is actually relevant here

1 and is not attenuated is what are the conversations they were
2 having with the government about 1498 and a statement of
3 interest.

4 THE COURT: Yeah, we covered it. We had a long -- we
5 just had a long conversation on it.

6 MR. HARBER: But this is about documents. That was
7 about the testimony and the -- and I would say the -- one of
8 the last things that counsel said there was it would implicated
9 Kirkland's e-mail with the government. Your Honor, what
10 Moderna is asking to do is stand and either before Your Honor
11 -- and I understand and I take your point that you won't be
12 swayed by it.

13 But potentially in front of the jury and say here's
14 this statement of interest that the government filed and you
15 should believe what the government is saying in this and you
16 should decided this government according to what the government
17 said and they've admitted that their own lawyers --

18 THE COURT: If they said that in their opening let's
19 say. What would you do?

20 MR. HARBER: We would say --

21 THE COURT: You'd say what? Objection. And I would
22 say sustained.

23 MR. HARBER: If Your Honor's ruling is that the can't
24 use --

25 THE COURT: No it's not my ruling.

1 MR. HARBER: -- a statement of interest then, but --

2 THE COURT: It's not my ruling. I'm saying I think
3 that you folks are worried -- it sort of a little bit spinning
4 out of control. Your discovery request for lobbying materials
5 and we want discovery to prevent that from doing something that
6 everyone in the room who's -- who you've taken a trial class
7 101 in law schools knows would never be admissible.

8 MR. HARBER: It's not hypothetical because they've
9 already relied -- they've already briefed to Your Honor the
10 statement of interest and they've admitted in court today that
11 their own lawyers were communicating with the government about
12 it. That's -- respectfully they can say like -- if they want
13 to give us the communications and then they can say later --
14 that's in a trial admissibility decision. They can say that's
15 not relevant for whatever reason and Your Honor will rule at
16 the time. But to say we can't have the discovery about --

17 THE COURT: You know I'm gonna sort of disagree with
18 I think with you on, I think you're saying, we get to look at
19 everything and the admissibility at trial is, you know, a whole
20 different kettle of fish. You know I can't manage this case
21 like that, because it's enormous. So it has to be some
22 connection to what's actually going to be in the trial.

23 MR. HARBER: And if Your Honor is saying they can't
24 rely on the statement of interest --

25 THE COURT: I'm not saying anything.

1 MR. HARBER: -- but if that's going to be --

2 THE COURT: You'll know what I'm saying when see my
3 work.

4 MR. HARBER: Understood.

5 THE COURT: Okay.

6 MR. HARBER: And the last point I would just address
7 is this common interest point that --

8 THE COURT: Mm-mm.

9 MR. HARBER: -- again it -- there is no common
10 interest. Moderna has made zero -- zero attempt to defend --
11 they haven't cited a single case. They haven't cited a common
12 interest agreement. They haven't cited a declaration from
13 anyone. There is -- it's their burden to establish that by
14 discussing this with the third party of the government that
15 they haven't waived any attorney/client privilege over that.
16 They have done nothing, zero to establish that and so that --
17 that is -- we're at the end of fact discovery and it's too late
18 for them to do that now.

19 THE COURT: Okay. Jen you want to talk about
20 something? Thank you.

21 MR. HARBER: Thank you.

22 THE COURT: You good?

23 COURT CLERK: Mm-mm.

24 THE COURT: Okay, I think that's the last issue.
25 This has been a very helpful discussion. Good to see

1 everybody. All this is held under advisement and we'll try to
2 turn this around as quick as possible. Is there something else
3 you want to talk about?

4 MR. MAHAFFY: So --

5 THE COURT: Yeah, go ahead.

6 MR. MAHAFFY: So, Your Honor, there was an issue that
7 came up at a deposition just two days ago that related directly
8 to infringement.

9 THE COURT: Okay.

10 MR. MAHAFFY: Infringement reports are due and --

11 THE COURT: You want me to weigh in on this now?

12 MR. MAHAFFY: Well, it's sort of time sensitive given
13 that infringement reports are --

14 THE COURT: Who is the deponent? Who is being
15 deposed?

16 MR. MAHAFFY: So it's Dr. Lee, an analytical chemist.

17 THE COURT: You're going to have to give me
18 background on that.

19 MR. MAHAFFY: What?

20 THE COURT: Background.

21 MR. MAHAFFY: So Dr. -- so it's about --it's about a
22 deposition for Dr. Lee --

23 THE COURT: Yeah.

24 MR. MAHAFFY: -- who is one of Moderna's --

25 THE COURT: And I'm asking who is he and where does

1 he fit.

2 MR. MAHAFFY: It's one of Moderna's analytical -- can
3 I give you some background on the --

4 THE COURT: Yeah, that's what I'm asking you to do.

5 MR. MAHAFFY: Okay, thank you. I will say this. You
6 know to the extent that I don't think this implicates any
7 highly confidential information but -- so I'll try to keep it
8 at a high level --

9 THE COURT: Okay.

10 MR. MAHAFFY: -- but if Moderna feels differently.
11 So just to provide your -- a little bit of context for Your
12 Honor and you may remember this. Plaintiffs have requested
13 certificates of analysis in this case, because they report the
14 lipid content of the nano particles in Moderna's vaccine. And
15 Moderna has agreed to give these certificates of analysis for
16 all of its batches, including the batches that it has analyzed
17 as well as the batches that third party contractor
18 manufacturers have analyzed.

19 We've also requested the raw data underlying the
20 those certificates of analysis, because they are more precise
21 than the certificates of analysis in themselves. They have
22 more significant digits as we've talked about before. And
23 Moderna has said that they'll produce the raw data for their
24 own certificates of analysis, but they're not going to produce
25 the raw data for those third party contract manufacturers.

1 And that was a -- that was a few months ago that they
2 told us that and what they explained was that, they went to
3 those third party contract manufacturers and it turned out that
4 it was very difficult to collect those data. And they argued
5 to us that it wasn't proportional to make that collection,
6 because they had already given us these certificates of
7 analysis.

8 THE COURT: Who create the raw date for the third
9 parties?

10 MR. MAHAFFY: Our understanding is that the third
11 parties created that data.

12 THE COURT: Okay so --

13 MR. MAHAFFY: And they --

14 THE COURT: -- can you -- I'm probably out ahead and
15 I should let you continue, but can't you just subpoena that
16 information?

17 MR. MAHAFFY: Well -- so our understanding is that,
18 you know, this is -- Moderna -- these are Moderna's contract
19 research organizations. They've already produced their --
20 they've already produced their certificates of analysis for
21 example and Moderna clearly is in communication with those
22 third parties about the data. And so --

23 THE COURT: Can you subpoena those third parties?

24 MR. MAHAFFY: I mean it is probably too late in this
25 case to --

1 THE COURT: Well not if I allow you to do it. But go
2 ahead.

3 MR. MAHAFFY: So perhaps that's a possibility. So
4 the issue -- so Moderna has always relied on those certificates
5 of analysis and they've always pointed frankly to Your Honor to
6 those certificates of analysis and to us about their importance
7 to the infringement analysis in this case.

8 At the deposition two days ago with Moderna's sort of
9 -- one of their top analytical chemist that oversees the
10 testing of the vaccine. She testified that she thought that it
11 would be unreliable to use those certificates of analysis to
12 calculate what the molar ratios, because of the very few
13 significant digits. And so -- and this obviously is a concern
14 for us. This is the first time that we've ever heard anyone
15 from Moderna say that those certificate of analysis which are
16 submitted to the FDA. Which Moderna has relied on to Your
17 Honor as well as to us that they might be unreliable in some
18 way.

19 And so we've reached out to Moderna and we basically
20 said, you know, either tell us that you're not going to --
21 you're not going to, you know, cast dispersions on you own
22 certificates of analysis or you need to give us the raw data --
23 you need to give use the raw data from these third party
24 contract manufacturers. They shouldn't have it both ways. If
25 they're going to say that the certificates of analysis are

1 unreliable they should have to produce the actual raw data.

2 THE COURT: Could we go back to something you said a
3 second ago, which is --

4 MR. MAHAFFY: Yeah.

5 THE COURT: I'm a little bit lost on, in what
6 scenario at trial Moderna would say, our certificates of
7 analysis which we use -- I guess what is that, like a quality
8 control thing?

9 MR. MAHAFFY: Yes, exactly. So we --

10 THE COURT: Are unreliable. That sound counter
11 intuitive to me.

12 MR. MAHAFFY: We didn't think that they would ever
13 make this argument until two days ago.

14 THE COURT: Well just because he said doesn't mean
15 they're going to make it.

16 MR. MAHAFFY: And so that's what we asked Moderna.
17 We've said -- so we went to Moderna and we said, please just
18 tell us that you're not going to make this argument and we'll
19 be okay and they refused to give us that confirmation.

20 THE COURT: So what is it you want?

21 MR. MAHAFFY: So we either want them to say that
22 they're not going to make this argument about the certificates
23 of analysis being unreliable or they have to go back and they
24 have to do this I guess burdensome exercise to collect the
25 actual raw data --

1 THE COURT: Mm-mm.

2 MR. MAHAFFY: -- which presumably they may think is
3 more reliable.

4 THE COURT: Okay, who is going to respond.

5 MR. McLENNAN: Your Honor, Mark McLennan, so what Mr.
6 Mahaffy mentioned was we did let them know this three months
7 ago. We didn't hear back. They never said can you try harder
8 to get this information from the third parties.

9 THE COURT: What did you let him know? I'm sorry.

10 MR. McLENNAN: Sorry?

11 THE COURT: What did you let him know?

12 MR. McLENNAN: We let him know -- you know we had
13 been trying with these third parties to collect the data as a
14 courtesy because it's outside of our possession, custody and
15 control.

16 THE COURT: Right.

17 MR. McLENNAN: They eventually said it's just not
18 possible. We can't do it. We let them know up front. We said
19 they just won't give it to us.

20 THE COURT: How many third parties are we talking
21 about?

22 MR. McLENNAN: Estimating about four -- four.

23 THE COURT: Go ahead.

24 MR. McLENNAN: Then didn't hear anything. Our
25 witness is deposed. Dr. Lee, she's a regulatory person, the

1 rule followers she's asked over and over again about, you know,
2 do you do this type of calculation as a regulatory person.
3 She's talking about -- she was designated to talk about the
4 procedures that Moderna has in written procedures. She's
5 saying we don't do that -- we don't do that. It's not in the
6 procedure. They just kept badgering her to answer it and then
7 she said, we just don't do that.

8 Now we get these e-mails saying, you can't say this
9 at trial, your experts can't do this, whatever else.

10 THE COURT: What did she say that -- did she say that
11 it was unreliable?

12 MR. McLENNAN: She said -- so after she said there's
13 no procedure for it, she said she wouldn't do it. So they have
14 one witness saying that and they're trying to limit positions
15 that we can take a trial of what our experts will say about
16 these things when they've had access to this information for
17 months. They've never said anything. It's not like we've
18 withheld any information, we've ambushed them. They've had
19 equal access to this information the whole time since we've
20 produced it.

21 THE COURT: What's your last name again. I'm sorry?

22 MR. MAHAFFY: Mahaffy.

23 THE COURT: Mahaffy.

24 MR. MAHAFFY: Yeah.

25 THE COURT: How does obtaining the four certificates

1 -- I'm very reluctant as you've seen to make rulings about what
2 people can do at trial a year before trial starts. I think
3 that's unwise. So your fallback position is, well discovery is
4 closed, let us get these certificate -- let us the raw data of
5 these certificates that they tried -- forced them to get these
6 for third parties they contract with to get us the raw data.

7 Is that what you want?

8 MR. MAHAFFY: I mean, we -- if they're not going to
9 represent that they won't make this argument then we want the
10 raw data.

11 THE COURT: Well I don't want to -- every time I've
12 made a ruling about what can happen at trial a year before the
13 trial, I've regretted it. I'm not doing it. So what's your
14 Plan B?

15 MR. MAHAFFY: Plan B is that they clearly -- these
16 are their contract manufacturers.

17 THE COURT: Right.

18 MR. MAHAFFY: They hired them to make the vaccine.
19 They do the testing at their direction.

20 THE COURT: Mr. McLennan said he's given it a good
21 faith effort, so what's your Plan C?

22 MR. MAHAFFY: I think that they would need to do this
23 more burdensome collection from the third parties.

24 THE COURT: How about if I authorize you to subpoena
25 these four people -- these four entities and get the raw data.

1 MR. MAHAFFY: I would take that as a backup. I think
2 it would frankly be much easier for Moderna to do that and
3 they're clearly in communication with these people. They work
4 with them all the time.

5 THE COURT: Well he's a standup guy. He's told me
6 he's given it a good faith and that he's banging his head
7 against the wall. That's what he told me, so. I'll take him
8 at his word. I'm going to allow you to issue a subpoenas
9 outside of -- I guess the discovery -- fact discovery is
10 closed. So you know who the four are? You know what you're
11 going to ask for? Do I have to oversee that? You can issue
12 subpoenas. I'm going to authorize that. Tell Ms. Hart, we'll
13 put this in our comprehensive order who the entities are and
14 exactly what you want, okay?

15 MR. MAHAFFY: Okay. I don't have those entities at
16 my fingertips.

17 THE COURT: You can call her.

18 MR. MAHAFFY: Okay. We'll --

19 THE COURT: Yeah.

20 MR. MAHAFFY: Okay

21 THE COURT: Okay.

22 MR. MAHAFFY: Sounds good, Judge.

23 THE COURT: All right.

24 MR. MAHAFFY: Okay.

25 MR. McLENNAN: Your Honor, could I just make one

1 other issue --

2 THE COURT: Sure.

3 MR. McLENNAN: -- to do with privilege log.

4 THE COURT: Yes.

5 MR. McLENNAN: So we've reached agreement we believe
6 so plaintiffs' logs had about 37,000 e-mails and documents on
7 them. We had an issue where common interest --

8 THE COURT: Wait the 37,000 was not a -- that's not a
9 number of identified documents. That's a number of privilege
10 objections withheld documents, 37,000.

11 MR. McLENNAN: So it could include -- I think it
12 could more than if it's family members, but that's number of
13 entries and we had an issue that we weren't able to figure out
14 who was a third party on that.

15 THE COURT: Mm-mm.

16 MR. McLENNAN: Because they've agreed to supplement
17 their log.

18 THE COURT: Okay.

19 MR. McLENNAN: But we just wanted to inform that
20 Court incase, you know, there's any over discovery necessitated
21 from that, but we've reached agreement so we're hoping --

22 THE COURT: Okay great.

23 MR. McLENNAN: -- it doesn't have to back to with
24 Your Honor.

25 THE COURT: I thought you were going to tell me I had

1 to -- I had to look at all these documents on 37,000 privilege
2 objections and then look at all at it in camera and figure it
3 out. You weren't going to say that, right?

4 MR. McLENNAN: No. No, Your Honor. Thank you.

5 THE COURT: Okay, so you're just -- that's by way of
6 a heads up. I'm kidding.

7 MR. McLENNAN: Correct, Your Honor. Thank you.

8 THE COURT: Understood. Okay. Nice to see everyone.
9 We'll turn this around as quickly as possible. Thank you.

10 MS. CARSON: Thank you, Your Honor.

11 MR. MAHAFFY: Thank you, Your Honor.

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C E R T I F I C A T I O N

I, SUE DiPIERRO, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of my ability.

/s/ Sue DiPierro
SUE DiPIERRO

J&J COURT TRANSCRIBERS, INC.

DATE: June 17, 2024